

Congress of the United States
Washington, DC 20515

May 22, 2019

The Honorable Eugene Dodaro
Comptroller General
U.S. Government Accountability Office
441 G Street, N.W.
Washington, DC 20548

Dear Mr. Dodaro:

As Chair and Ranking Member of the U.S. House and Senate Appropriations Subcommittees on the Interior, Environment, and Related Agencies, respectively, we are writing to request that the U.S. Government Accountability Office (GAO) issue a legal opinion regarding whether certain activities conducted by the U.S. Department of the Interior (Department) violate provisions of appropriations law, including longstanding restrictions on the use of appropriated dollars to fund resource development activities within the historic boundaries of national monuments as well as the Anti-Deficiency Act (13 U.S.C. 1341 et. seq.).

Specifically, we ask that GAO evaluate the actions taken by the Department in 2017, 2018 and 2019 to facilitate future oil, gas, and coal development within the historic boundaries of the Grand Staircase-Escalante National Monument in Utah in the context of sections 408 of the fiscal year 2017 Interior Appropriations Act (P.L. 115-31), fiscal year 2018 Interior Appropriations Act (P.L. 114-151) and fiscal year 2019 Interior Appropriations Act (P.L. 116-6), which state:

No funds provided in this Act may be expended to conduct preleasing, leasing and related activities under either the Mineral Leasing Act (30 U.S.C. 181 et seq.) or the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) within the boundaries of a National Monument established pursuant to the Act of June 8, 1906 (16 U.S.C. 431 et seq.) as such boundary existed on January 20, 2001, except where such activities are allowed under the Presidential proclamation establishing such monument.

The Department's action to identify and quantify areas for potential oil, gas, and coal development within the boundaries of the Grand Staircase-Escalante National Monument as of January 20, 2001, as part of the resource management planning process appears to contravene the plain language of this provision. Because Congress clearly prohibited funds from being used for these purposes, we also believe that the Department likely violated provisions of the Anti-Deficiency Act, which prevent a Federal agency from "making or authorizing an expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law."¹ More detail on these arguments is found below.

¹ 31 U.S.C. § 1341(a)(1)(A).

Background on Protections for the Grand Staircase-Escalante National Monument

President Clinton invoked the Antiquities Act of 1906 (16 U.S.C. 431-433) and issued a Proclamation to establish the Grand Staircase-Escalante National Monument to restrict future mining activities and conserve significant biological, geological, and paleontological resource values located across 1.7 million acres in the State of Utah.² As part of the proclamation, President Clinton specifically withdrew all federal lands and interests from “entry, location, selection, sale, leasing or other disposition under the public land laws,” subject only to valid existing rights.³

To further enshrine the prohibition on mineral development within the area, as well as other sensitive lands, Congress enacted for the first time in its fiscal year 2002 appropriations act a prohibition for the Department of the Interior from using any appropriated funds to conduct any “preleasing, leasing, and related activities” under the Mineral Leasing Act or the Outer Continental Shelf Lands Act.⁴ Notably, Congress decided to prohibit this broad suite of activities within the boundaries of Grand Staircase Escalante “as such boundary existed on January 20, 2001.”⁵ The only narrow exception Congress provided was for “where such activities are allowed under the Presidential proclamation establishing such monument.” Congress has carried this funding prohibition in every Interior appropriations act since passage in the FY 2002 funding act. The provision is so well established that the Trump Administration’s own Department of Justice recognized the limitation imposed by the provision on leasing, preleasing and related activities in a recent court filing.⁶

Background on Trump Administration Actions

On December 4, 2017, more than 21 years after President Clinton’s designation, President Trump issued Proclamation 9682, which attempted to modify the Grand Staircase-Escalante National Monument by removing protections from nearly half of the original monument. This proclamation has since been challenged as unlawful on the basis that a President may designate lands to become part of a national monument but may not rescind or revoke that designations.⁷ Subsequent to President Trump’s proclamation, the Department, acting through the Bureau of Land Management (BLM) clearly spent appropriated funds on a range of activities that Congress prohibited—all tied to the Department’s consideration, development, execution, and implementation of a directive in President Trump’s proclamation that “the public lands excluded from the monument reservation shall be open to . . . disposition under all laws relating to mineral and geothermal leasing.” These actions include the development of a resource management plan (RMP) for both the scaled-back Grand Staircase-Escalante National Monument and for the lands that the Administration asserts have been removed from the

²² See Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996).

³ See *id.*

⁴ Sec. 331, Pub. L. No. 107-63, § 331, 115 Stat. 471.

⁵ *Id.*

⁶ Fed. Defendants Reply in Support of their Mot. To Dismiss, *The Wilderness Society v. Trump*, Civ. No. 1:17-cv-02587, ECF No. 81, 3 (D.D.C. filed Mar. 20, 2019).

⁷ See *The Wilderness Society v. Trump*, Civ. No. 1:17-cv-02587 (D.D.C. filed Mar. 20, 2019).

monument—all public lands, however, that exist within the boundaries of Grand Staircase Escalante “as such boundary existed on January 20, 2001.”⁸

The Draft RMP examines coal suitability and unsuitability, and identifies lands available for future leasing under the Mineral Leasing Act and constraints for future development for Grand Staircase-Escalante National Monument and the Kanab Escalante Planning Area (KEPA), which encompasses lands within the original 2001 boundary of the monument that the President attempted to remove through the challenged proclamation. There, the agency’s preferred alternative, Alternative D, for the KEPA identifies opening 551,582 acres to oil and gas leasing under moderate constraints and another 108,230 acres under major constraints. Alternative D as well as Alternatives B and C also identify 75,076 as unsuitable to surface coal mining operations or surface operations incident to an underground coal mining, leaving the rest of the lands open to leasing as suitable pursuant to possible site specific determinations.

These activities—the preparation of environmental documents, such as an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA), and the RMP—we believe fall within the class of activities Congress has prohibited (that is, “preleasing, leasing and related activities” under the Mineral Leasing Act).⁹ The Department is conducting these activities in accordance with the requirements of the Mineral Leasing Act. The Draft RMP, for example, dives into great detail about the scope of and limitations on oil, gas, and coal leasing posed by various laws, including the Mineral Leasing Act of 1920.¹⁰ The BLM Land Use Planning Manual (H-1601-1, Appendix C, p. 23) likewise explains that the first step in coal leasing and fluid minerals leasing is the identification of areas open to leasing and the “constraints” at the land use planning level—activities that the Department carries out through an RMP.

We note that the activities described above do not fall under the lone exception prescribed by the provision, which allows development to occur only “where such activities are allowed under the Presidential proclamation establishing such monument.”¹¹ Turning to the original proclamation Congress referenced, that proclamation only allowed for leasing activities to the extent they were then “valid existing rights.” The Department’s current activities for new, future leases do not fall within an existing right as of 2001. Nor does President Trump’s proclamation “establish” a national monument; instead, the plain text of Proclamation 9682 makes clear that President Trump was merely *modifying* the boundaries.¹²

⁸ Pub. L. No. 107-63, § 331, 115 Stat. 471.

⁹ See, e.g., *S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1262 (D. Utah 2006), *aff’d in part*, appeal dismissed in part sub nom. *S. Utah Wilderness All. v. Kempthorne*, 525 F.3d 966 (10th Cir. 2008) (describing the preparation of an EIS and RMP as “pre-leasing.”).

¹⁰ See, Department of the Interior, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT AND KANAB-ESCALANTE PLANNING AREA RESOURCE MANAGEMENT PLANS AND ENVIRONMENTAL IMPACT STATEMENT at F-15, available at https://eplanning.blm.gov/epl-front-office/projects/lup/94706/155936/190916/GSENM-KEPA_RMPs-EIS_Vol_2-508.pdf (last accessed May 14, 2019).

¹¹ Sec. 331, Pub. L. No. 107-63, § 331, 115 Stat. 471.

¹² See Presidential Proclamation Modifying the Grand Staircase-Escalante National Monument (Dec. 4, 2017)

Effect on Other Pending Litigation

While there is a separate legal question pending about the President's authority to issue a proclamation to reduce the size of a national monument, we want to make clear that we are not asking GAO to opine on this matter. The complaints filed there challenge President Trump's proclamation as a violation of the Antiquities Act and question his authority to reduce the boundaries of Grand Staircase-Escalante National Monument. Given that the subject of GAO's inquiry—Section 408—is focused on the boundary "as such boundary existed on January 20, 2001," the outcome of the litigation over subsequent modifications to the National Monument is irrelevant. Put differently, there is no doubt that the lands identified for future leasing are within the boundary as it existed on January 20, 2001, regardless of whether or not a judge vacates the subsequent boundary reduction. With that as context, we are focusing our inquiry on the question of whether the steps that the Administration has recently taken comport with legal restrictions contained in consecutive appropriations acts that apply to preleasing, leasing, or any other related activity under the Mineral Leasing Act within the boundaries of the Grand Staircase-Escalante National Monument, as that monument existed on January 20, 2001.


Requested Action

To resolve whether the agency complied with relevant appropriations law, we hereby request that GAO provide us with a legal opinion that answers the following questions:

1. Does GAO believe that the Department's actions to identify and quantify areas for potential oil, gas, and coal development within the boundaries of the Grand Staircase-Escalante National Monument as of January 20, 2001, as part of the resource management planning process violate sections 408 of the fiscal year 2017 Interior Appropriations Act (P.L. 115-31), fiscal year 2018 Interior Appropriations Act (P.L. 115-141) and/or fiscal year 2019 Interior Appropriations Act (P.L. 116-6)?
2. If the Department of the Interior did in fact violate appropriations law during any of these fiscal years, does GAO believe that the agency's actions also constitute a violation of the Anti-Deficiency Act?

If you have any questions or concerns, please do not hesitate to contact Rita Culp on Chair McCollum's staff at (202) 224-3081 or Rachael Taylor on Ranking Member Udall's staff at (202) 224-6621. We look forward to hearing from you soon, and we thank you for your attention to this important matter.

Sincerely,



Betty McCollum
Chair
House Subcommittee on the Interior,
Environment, and Related Agencies



Tom Udall
Ranking Member
Senate Subcommittee on the Interior,
Environment, and Related Agencies